

Issue: Qualification/Retaliation-Grievance Activity; Ruling Date: September 19, 2002;
Ruling #2002-136 & 139; Agency: Mary Washington College; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Mary Washington College/ Nos. 2002-136 & 139
September 19, 2002

The grievant has requested rulings on whether one of his May 20, 2002 grievances and his June 5, 2002 grievance with Mary Washington College (MWC or the agency) qualify for a hearing. The grievant asserts that he was subjected to: (1) race-based discrimination and harassment, and (2) retaliation for his prior use of the grievance process. Both qualification requests are addressed in this ruling. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

Mary Washington College employs the grievant as a locksmith. The grievant initiated a grievance on May 20, 2002, alleging race discrimination and harassment. In support of those claims, the grievant asserts that management harassed him by directing him to explain in writing why he did not lock down the dorms by noon on May 12, 2002 and why he did not answer his pager when "on-call" the weekend of May 18, 2002.

His June 5, 2002 grievance alleges retaliation and discrimination. To support those claims, he contends that management's requirement that he sign out keys is retaliatory and based on his filing of previous grievances. He asserts that only after he filed his June 5, 2002 grievance were other employees besides himself required to sign keys in and out. Management denied qualification of both the May 20, 2002 and June 5, 2002 grievances and the grievant requested rulings from this Department

DISCUSSION

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. Specifically, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out, including management directives, generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced

management's actions, or whether state policy may have been misapplied.¹ In this case, the grievant asserts that management retaliated against him for prior grievance activity and discriminated against him on the basis of race.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;² (2) *he suffered an adverse employment action*; and (3) a causal link exists between the adverse employment action and the protected activity.³ For a claim of racial discrimination to qualify for hearing, the grievant must establish (1) that he is a member of a protected class; (2) that he was qualified for the job and his job performance was satisfactory; (3) that in spite of his qualifications and his performance *he suffered an adverse employment action*; and (4) that he was treated differently than similarly situated employees outside the protective class.⁴ In this case, neither the retaliation nor the discrimination claim qualifies for a hearing because the grievant has not suffered an "adverse employment action," a required element of both claims.

An "adverse employment action" must be one that results in an adverse effect on the terms, conditions, or benefits of employment."⁵ This includes any management action having some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.⁶ None of the management actions grieved had such an adverse effect on the terms, conditions or benefits of grievant's employment. Management's directives to the grievant (to provide a written explanation for his alleged actions, to sign his keys in and out), without more, simply do not rise to the level of adverse employment actions.

Moreover, these grievances present insufficient evidence of any retaliatory or discriminatory intent. Rather, the facts cited in support of the grievant's claims can best be summarized as describing a difference of opinion between the grievant and management's decisions and actions surrounding his work performance. Such claims of

¹ Va. Code §2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(c) page 11.

² *Grievance Procedure Manual* § 4.1(b)(4), page 10. Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste, and Abuse Hotline, or exercising any right otherwise protected by law."

³ *See* *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998). (Emphasis added).

⁴ *Hutchinson v. Invova Health System. Inc.*, 1998 U.S. Dist. LEXIS 7723 at 3-4 (E.D. Va. 1998) citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). (Emphasis added). If the plaintiff establishes a prima facie case, a presumption of discrimination arises that may be rebutted by the employer's showing of a legitimate, non-discriminatory reason for its actions. The plaintiff then bears the burden of proving by a preponderance of the evidence that the employer's articulated reasons is pretextual. *Hutchinson* at 4.

⁵ *See* *Von Gunten v. Maryland Dept. of the Environment*, 243 F. 3d 858 (4th Cir. 2001).

⁶ *See* *Boone v. Golden*, 178 F. 3d.253 (4th Cir. 1999).

means, methods and personnel, while grievable through the management steps, are not among the issues identified by the General Assembly that may qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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